STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT

IN THE MATTER OF THE APPLICATION
OF ROPER CONSTRUCTION, INC. FOR AQB 21-57(P)
AN AIR QUALITY PERMIT NO. 9295,
ALTO CONCRETE BATCH PLANT

REPLY MEMORANDUM IN SUPPORT OF RENEWED MOTION TO DISMISS NSR SOURCE PERMIT APPLICATION AND CASE NO. ABQ 21-57(P) FOR FAILURE TO PROVIDE NOTICE MANDATED BY REGULATIONS

The Property Owners of Sonterra ("Sonterra") submits this reply memorandum in support of its Motion to Dismiss the referenced administrative case and Roper Construction, Inc.'s ("Roper's") application for an air quality construction permit based on the demonstrated failure of Roper to comply with the notice methodology mandated by 20.2.72.203.B(1) NMAC, which requires the use of a current tax schedule to identify the property owners within one-half (1/2) mile of the proposed facility. This flagrant and egregious departure from the regulatory notice requirements resulted in thirteen (13) property owners who did not receive notice. Consequently, the continuation of these proceedings is based on an application that is not administratively complete, and all administrative proceedings conducted previously in this matter, together with all prospective administrative actions, are void.

As further support for its Motion, Sonterra states:

1. Roper's response seeks to minimize the deficient notice by claiming that one of the recipients of the defective mailing was Roper's predecessor-in-interest and that it is of no consequence that Roper itself did not receive notice of the application. Sonterra included Roper as one who did not receive notice to underscore the absurdity of Roper's improper notice methodology, which was used to provide notice to an entity who was not even Roper's immediate

grantor, but some previous owner in the chain of title based on significantly stale information relied upon by Roper that does not, under any view of the circumstances, comply with the mandate to use a current tax schedule.

2. Sonterra pointed out unambiguously the requirement of 20.2.72.203.B(1) to provide notice by certified mail "to the owners of record, as shown in the most recent property tax schedule . . ." To assist the Hearing Officer with identifying the proper methodology, Sonterra set forth the statute identifying the elements of a tax schedule, including the assessed value of the property, the current taxable value of the property, and the taxes owed and, most importantly, the identity of the current owner of the property. *See* NMSA 1978, § 7-38-35 (identifying matters set forth in "property tax schedule"). Sonterra's motion has attached to it as exhibits each current property tax schedule for the 13 owners for whom Roper failed to provide notice. Nonetheless, Roper's response continually parrots the false statements that Roper used "property tax schedules," although it is uncontroverted that Roper did nothing of the sort. There are no tax schedules provided as exhibits to Roper's application because it is uncontroverted that Roper used a parcel list provided by the assessor, based on ownership information that is not updated on any regular basis to reflect the current ownership of properties and for which the third-party vendor explicitly cautions should not be used to determine current ownership.

3. Like Roper, the NMED and the Hearing Officer himself refuse to recognize the crucial distinction between the property tax schedule mandated by the regulation and the outdated property information based on parcel numbers derived from the assessor's parcel map. In paragraph 9 of the order denying Sonterra's initial motion to dismiss, the Hearing Officer stated, "Movants asserted that the information relied on by Roper was not current and that Roper should have verified the assessor's list by using another method to ensure accuracy." Sonterra objects to

this finding, which is completely contrary to Sonterra's position. Sonterra never suggested that "another method" should be used "to ensure accuracy." Sonterra argued that only *one method* is permissible under the regulation, which is to identify current owners of property entitled to notice by using the property tax schedule readily available on the assessor's website.

4. Identifying the current owner of all properties within one-half mile of the proposed facility is a simple matter. Although the Hearing Officer prevented Sonterra from making an offer of proof on this matter – which is clearly an abuse of discretion – Sonterra employed the proper methodology and submitted the results in its Renewed Motion. *See Wood v. Citizens Standard Life Ins. Co.,* 1971-NMSC-011, ¶ 7, 82 N.M. 271, 272, 480 P.2d 161, 162 ("A proper tender or offer of proof is essential to the preservation of error in improperly excluding evidence.") The procedure is straightforward: after receiving the parcel numbers and outdated ownership information from the assessor, the applicant need only input that parcel number into the live website and request the current tax schedule. The current tax schedule is immediately produced, together with the current owner of the property and all of the information required by Section 7-38-35, NMSA 1978.

5. Perhaps even more troubling than the mischaracterization of Sonterra's position and the abrogation of regulatory notice requirements is the NMED's complete abdication of its oversight responsibility to ensure that the application is administratively complete. Notably, counsel for the NMED argued for a relaxed notice analysis and that the Hearing Officer should somehow be "deferential" to the NMED's interpretation of its own regulations. In the aftermath of Sonterra's discovery of 13 property owners who did not receive notice, the NMED is conspicuously quiet about this so-called "deference," instead electing to take no position on Sonterra's renewed motion.

6. There is no question that the subject of proper notice is a threshold matter and that failure to provide the mandated notice invalidates all proceedings conducted after the delivery of the defective notice. Again, as stated by the Court of Appeals in *Martinez v. Maggiore,* 2003-NMCA-043, 133 N.M. 472:

> We once again follow *Nesbit* and hold that the administrative proceedings conducted subsequent to landfills defective notice are invalid. We vacate the order granting Landfill's application and remand to the Secretary for *de novo* review of Landfill's application after publication of notice substantially complying with subsection 74-9-22C.

¶ 13.

7. Moving forward with this proceeding not only violates regulatory notice provisions, but also implicates the due process rights of the landowners who have not received proper notice of these proceedings. Section 20.2.72.203.A, addressing the contents of the air quality permit application, mandates as follows:

> The items of this section, if requested in the applicable application form, *are required* before the department may deem an application administratively complete.

20.2.72.203.A NMAC. (emphasis added). The most crucial part of Section 203 is the directive that the application "shall" provide notice to the owners of record, based on the "most recent property tax schedule." As a result of Roper's failure to do so, the application is not administratively complete and the time periods typically triggered by such a determination have not even begun to run.

8. There are serious consequences resulting from proceeding with an administratively incomplete application. The hearing in this matter is currently scheduled for February 9, 2022, only 29 days after the date of this filing. During the mandatory 30-day period following receipt

of notice, the 12 landowners (excluding Roper) will have the right to submit comments, to express an interest in writing about the permit application, to receive copies of the public notice posted by Roper, to have the opportunity to review the NMED's analysis, and to participate in a fulsome manner. *See* 20.2.72.206 NMAC. If this matter is not dismissed and proceeds as scheduled, all of these rights will be extinguished.

9. Moreover, the due process violations will be compounded by the scheduling order currently in effect. Technical testimony is due January 19, 2022, a mere eight days from the date of this filing. It is patently unreasonable to suggest that any of the twelve (12) property owners who wish to retain an air quality expert or other technical witness must do so within one week, or perhaps less, and must also be prepared to file any pre-trial motions at the same time. There is no conceivable way such an oppressive and unreasonable requirement could withstand a due process scrutiny. *See Maggiore,* 2003-NMCA-043, ¶¶ 16-17 (notice given less than three weeks prior to the deadline to file a statement of intent to present technical testimony constituted a due process violation).[1]

10. Roper's lack of concern for these due process rights is highlighted by its ineffectual attempt to cure the significant notice violations with a rush to submit proper notice immediately prior to filing its response. This brazen conduct is only surpassed by the conduct of the NMED

[1] Based on Roper's previous filings, Sonterra anticipates that Roper will attempt to divert attention away from the impropriety of its notice methodology by attempting to argue that Sonterra and the Weems do not have standing to assert a due process violation on behalf of the landowners that did not receive notice. Under similar circumstances, the New Mexico Court of Appeals rejected such an argument, finding that appellants satisfied the requirements for third-party standing – i.e., (1) injury in fact giving appellant a "sufficiently concrete interest" in the outcome; (2) close relationship with the third party; and (3) there is some hindrance to the third party's ability to protect his or her own interests. *See Maggiore,* 2003-NMCA-043, ¶¶ 18-19.

itself, which has no interest in discharging its oversight responsibilities and protecting the due process rights of these property owners.

11. In Roper's ineffectual rush to cure the notice deficiency, it is notable that Roper did not even bother to independently conduct a property ownership evaluation by inserting the parcel number into the live assessor website to obtain a current property tax schedule for each property within one-half (1/2) mile of the proposed facility. Instead, Roper's counsel requested that counsel for Sonterra send to him a Word version of Sonterra's identification of property owners, which counsel for Sonterra accommodated and which Roper apparently used for its recent untimely notices. Sonterra, however, is not the applicant, nor should Sonterra assume the oversight responsibilities of NMED. The time for Roper and the NMED to continue to rely on Sonterra to ensure proper notice and the protection of due process rights should come to an end. This matter should be dismissed in its entirety, and Roper should begin anew to resubmit an application that may be deemed administratively complete, so that the regulatory time periods applicable to all property owners have substantive meaning.

WHEREFORE, Sonterra respectfully requests that the Hearing Officer enter an order dismissing the NSR source permit application and Case No. ABQ 21-57(P).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2022, I caused a true and correct copy of the foregoing pleading to be electronically served on the following:

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